Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands	)	WT Docket No. 03-66 RM-10586
	)	
Part 1 of the Commission's Rules – Further Competitive Bidding Procedures	)	WT Docket No. 03-67
	)	
Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions	)	MM Docket No. 97-217
	)	
Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico	)	WT Docket No. 02-68 RM-9178
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230

To: The Commission

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION OF BELLSOUTH CORPORATION, BELLSOUTH WIRELESS CABLE, INC. AND SOUTH FLORIDA TELEVISION, INC.

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Summary

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") oppose certain petitions for reconsideration in this proceeding, and support proposals in other petitions. By declining to adopt proposals that would undermine the Commission's well-established policies and implementing only those proposals that would promote the Commission's policies, the Commission can create an environment that facilitates the development and growth of competitive wireless services on BRS/EBS spectrum.

The Commission should reject two proposals. First, there is no factual or legal basis whatsoever for the Commission to restrict incumbent Local Exchange Carriers ("ILECs") or DSL providers from acquiring BRS and EBS spectrum rights for the provision of data services. The five petitioners arguing for this change readily admit that the provision of data services on BRS/EBS spectrum "is a recent development" for which, at this time, there can be no evidence that restrictions would be necessary. The petitioners also fail to offer any support for the view that an *a priori* restriction would address their allegations of anti-competitiveness and excessive competitiveness. The Commission's "substantial service" rules will, when adopted, create adequate incentive for licensees to use their BRS/EBS spectrum, and the secondary market rules already require the Commission to examine competition issues on a case-by-case basis when it reviews transactions.

Second, the Commission should reject efforts to restructure the EBS leasing regime which, if adopted, would decrease flexibility and increase administrative burdens and Commission oversight. Any mandatory increase in the minimum educational usage

requirement would contravene existing policy that recognizes the harm in limiting EBS licensees to a "one size fits all" standard and the effect on investment such an encumbrance would have on a lessee's ability to maximize the value of the spectrum. Similarly, the Commission should not attempt to further define the existing five percent minimum, but should recognize that decisions on capacity usage are best left to negotiations between the lessor and the lessee. EBS licensees also should retain the right to negotiate lease provisions that grant its lessee a right of first refusal to acquire its license, conditioned on the Commission's decision to expand eligibility to include commercial entities. Restricting this practice could leave the lessee without the means to continue using the spectrum despite its long-term commercial investment and support of educational services. The Commission should reject efforts to re-establish an artificial 15-year maximum EBS term limit, a restriction that has no bearing on educational use and one that would be inconsistent with the secondary market rules, which impose no limitation and encourage flexibility and spectrum use. The Commission should not require EBS leases to provide an EBS licensee with the right to its lessee's equipment following lease termination or, in the alternative, should clarify those rights. The Commission also should not require EBS leases to be filed with the Commission, but rather should acknowledge that the secondary market rules will, before the lease arrangement is approved, ensure compliance with Commission rules.

BellSouth urges adoption of many of the changes to the transition rules sought by other petitioners on reconsideration, which will add greater certainty to the complex transition process. In particular, BellSouth strongly supports use of Basic Trading Areas ("BTAs") as the baseline transition area, instead of Major Economic Areas ("MEAs").

There is no support in the record for MEAs, which are too large and too costly to transition, and thus will defeat the Commission's intent to facilitate a rapid nationwide transition. BTAs are smaller and more closely resemble the areas where operators provide service. BellSouth also favors the extension of the Initiation Period to be followed by a 12-month "self transition" period. The Commission should reject one petition that ostensibly proposes an alternative band plan for rural operators, and instead should adopt its proposal to allow analog multichannel video programming distributors to exchange their channels for digital spectrum in the Middle Band Segment. BellSouth strongly believes that the Commission should permit licensees to automatically "opt out" of a transition if they meet certain criteria, without having to navigate the uncertain and time-consuming waiver process the Commission established. BellSouth supports adoption of an alternative location for channels BRS-1 and BRS-2 where the licensee has not transitioned.

The Commission also should make minor changes to certain parts of the transition process in order to improve communications between proponents and licensees and remove unnecessary administrative burdens. For example, a transition proponent should have the right to withdraw one transition plan without penalty, in recognition of the complexity inherent in transition planning. BellSouth supports the addition of transition "safe harbors" that would provide EBS licensees with greater certainty about the reasonableness of a transition plan, thereby reducing the potential for disputes. BellSouth disagrees with one petitioner that would require transition costs to be reimbursed before the reimbursing licensee commences commercial service. The Commission should make clear that the costs to relocate BRS-1 and BRS-2 licensees to the 2495-2690 MHz band

will be borne by the auction winners in the Advanced Wireless Services auction and not by transition proponents.

BellSouth also supports changes to certain technical rules. There is no support in the record for allowing unlicensed devices to operate in the 2655-2690 MHz portion of the band, which limits the exclusive rights of licensees to make full use of their spectrum, inhibits their ability to permit secondary market usage and acts as a disincentive to additional investment. BellSouth favors proposals that would require a licensee to provide notice to a neighboring licensee if it exceeds the signal strength limits at its border. The Commission also should modify its rules to state that out-of-band emissions should be measured at the outermost edges of combined channels where a licensee holds licenses on adjacent spectrum (*e.g.*, E1-E3 and F1-F3). For BRS-1, the Commission should clarify that the spectral mask is measured from the edge of the guardband (*i.e.*, 2495 MHz) instead of the edge of channel BRS-1 (*i.e.*, 2496 MHz).

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To: The Commission

CONSOLIDATED OPPOSITION TO PETITIONS FOR RECONSIDERATION

BellSouth Corporation and its wholly-owned subsidiaries BellSouth Wireless Cable, Inc. and South Florida Television, Inc. (collectively, "BellSouth") hereby oppose certain petitions for reconsideration filed in this proceeding.[1] As BellSouth demonstrates

[1] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) ("*BRS/EBS Order*"). References to the Further Notice of Proposed Rule Making portion of that document will be defined as the "*FNPRM*."

below, a number of the proposals would completely undermine the very benefits established by the Commission in the *BRS/EBS Order*, and thus the Commission should reject them. BellSouth also demonstrates that other petitions propose solutions that would further advance the beneficial policies underpinning the *BRS/EBS Order*, and thus the Commission should adopt them. Specifically, the Commission should:

- Reject proposals to restrict incumbent local exchange carriers ("ILECs") from acquiring BRS and EBS spectrum rights for data services, and restructure the EBS spectrum leasing rules to reduce flexibility and increase administrative burdens.

- Adopt proposals to simplify and improve the transition process, including:
  - reducing the size of the transition areas to Basic Trading Areas ("BTAs");
  - changing the transition Initiation Period to 30 months from the effective date of new rules to be adopted in a Second Report and Order in this proceeding, with a "self-transition" period thereafter;
  - permitting licensees to "opt out" of a transition upon meeting certain criteria;
  - fine-tuning the transition procedures to facilitate the flow of information to and from transition proponents;
  - permitting transition proponents a one-time opportunity to withdraw transition plans without penalty;
  - adding certain transition "safe harbors;" and
  - providing assurances for reimbursement of BRS-1 and BRS-2 relocation costs by Advanced Wireless Services ("AWS") auction winners.

- Adopt changes to the technical rules that better protect licensees from harmful interference.

Discussion

I. THE COMMISSION MUST REJECT PROPOSALS THAT WOULD PROHIBIT OR LIMIT ILECs FROM ACQUIRING BRS AND EBS SPECTRUM.

In the *BRS/EBS Order*, the Commission rejected efforts to restrict providers of digital subscriber line ("DSL") services from holding BRS and EBS spectrum rights. The Commission based its decision on a review of the record and carefully followed Section 151 of the Communications Act of 1934, as amended (the "Act"), and its own policies

and precedent that disfavor excluding classes of service providers from obtaining spectrum rights.[2] The Commission properly concluded that the record did not present "relevant market facts and circumstances sufficient to demonstrate that the eligibility of such service providers is likely to result in substantial competitive harm or that, even if specific markets experienced harm to competition, the eligibility restrictions they advocate would be effective in eliminating that harm."[3] The Commission thus confirmed that DSL providers could continue to hold and acquire BRS and EBS spectrum rights.

Five petitioners filed nearly identical petitions seeking reconsideration of the Commission's decision.[4] Although these petitioners acknowledge the Commission's two-pronged standard under Section 151 of the Act, *they cite no evidence whatsoever to support the need for eligibility restrictions*. They rely solely on rhetoric and conjecture and improperly attempt to shift the burden to the Commission to justify the absence of eligibility restrictions. They also fail to make any factual showing that would warrant *a priori* restrictions. The Commission should reject these petitions on this basis alone.

Initially, these five petitioners argue against their own interests by acknowledging that the use of BRS and EBS spectrum to provide data services "is a recent development, and given that the cable-cross ownership prohibitions were believed to prevent any ownership of such spectrum by a cable operator, there are no relevant facts and

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[2] *See BRS/EBS Order* at ¶175 (emphases added).

[3] *Id.*, *citing* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Notice of Proposed Rulemaking*, 18 FCC Rcd 6722, 6773-74 (2003) (footnote omitted).

[4] *See* Petition for Reconsideration of C&W Enterprises, Inc. ("C&W Petition") at 5; Petition for Reconsideration of Cheboygan-Otsego-Presque Isle Educational Service District/PACE Telecommunications Consortium ("COPIES/PACE Petition") at 4-5; Petition for Reconsideration of Digital Broadcast Corporation ("DBC Petition") at 5-6; Petition for Reconsideration of SpeedNet, L.L.C. ("SpeedNet Petition") at 4-5; Petition for Reconsideration of Wireless Direct Broadcast System ("WDBS Petition") at 4-5. DBC and WDBS make an additional argument that the restriction should apply to channels in the Middle Band Segment ("MBS"), if the Commission does not impose a blanket restriction. BellSouth addresses this alternative argument *infra*.

circumstances to cite in which to support" the Commission's decision to forego imposition of eligibility restrictions on DSL providers.[5] First, it is precisely *because* the use of BRS/EBS spectrum for data services is a recent development that no evidence is available to support the petitioners' claims – and precisely why the Commission legally cannot impose eligibility restrictions. As stated in the BellSouth NPRM Comments, "there is no product market or geographic market for the rebanded MMDS and ITFS spectrum, only a nascent marketplace with unproven technology, unknown geographic and product markets and untested business cases."[6] Second, the Commission's interpretation in the *BRS/EBS Order* that Section 613(a) of the Act applies only to cable services makes clear that Congress intended only to restrict cable operators from acquiring certain BRS and EBS spectrum rights and that there is no independent reason to extend restrictions to DSL providers or ILECs.[7] Third, it is the obligation of entities like the petitioners, not the Commission, to present specific facts demonstrating that the Commission should depart from its policies and adopt *a priori* restrictions. The petitioners' effort to shift this burden is a thinly-disguised attempt to mask their own inability to help the Commission develop a record to support their assertions – not surprising given their own admission about the "recent development" of wireless data services in this band.

The remainder of the petitioners' arguments rely on contradictory theories of anti-competitiveness and excessive competitiveness, neither of which advance beyond mere conjecture. The petitioners assert, but do not describe, that permitting use of spectrum by

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[5] C&W Petition at 5; COPIES/PACE Petition at 4-5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5.
[6] Comments of BellSouth filed September 8, 2003 ("BellSouth NPRM Comments") at 21.
[7] *See BRS/EBS Order* at ¶¶173, 176.

ILECs "would further prohibit the development of such systems and encourage warehousing of spectrum by large entities hoping to delay or quash competition."[8] As BellSouth previously demonstrated, DSL providers "possess substantial financial resources, technical expertise and experience in delivering services to consumers expeditiously, and these companies should not be denied the opportunity to use their spectrum to integrate advanced wireless services with their existing DSL network."[9] As for the petitioners' allegations that "large entities"[10] would be encouraged to acquire spectrum to foreclose competition, there is no evidence to suggest that this would be the case or that there would be any incentive to do so. As BellSouth showed in its NPRM Comments, while some DSL providers may be large entities, they serve only about one-third of the residential broadband market, which is dominated by cable modem providers.[11] In order to provide more competition to cable modem services, BellSouth will need to extend its broadband service beyond the current coverage of its DSL network. Wireless spectrum such as BRS/EBS is one option affording BellSouth this opportunity to compete.

Likewise unfounded is the petitioners' claim that "ILECs have been adamant about protecting access to their networks, preventing competition whenever possible, while demanding access to spectrum used by their competitors."[12] BellSouth is an innovator and has spent billions of dollars building out its networks and delivering

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[8] C&W Petition at 5; COPIES/PACE Petition at 4-5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5.
[9] BellSouth NPRM Comments at 23.
[10] Many DSL providers, ILECs and cable operators are not large entities, but are locally-owned cooperatives, competitive LECs or small cable companies. Not that it would help their cause, but the petitioners make no distinction among these entities, instead treating them as if they are homogenous.
[11] BellSouth NPRM Comments at 18.
[12] C&W Petition at 5; COPIES/PACE Petition at 5; DBC Petition at 5; SpeedNet Petition at 5; WDBS Petition at 5.

services to customers, while meeting its obligations under the Act to interconnect with other local telephone companies. In the BRS/EBS band, BellSouth spent hundreds of millions of dollars to acquire systems, upgrade the systems to digital technology and provide service to tens of thousands of customers. The petitioners also utterly fail to appreciate that there are numerous other competitive possibilities. As the Commission found in the *39 GHz Order*,[13] "[g]iven all these competitive possibilities, it is implausible that incumbent LECs would pursue a strategy of buying 39 GHz licenses in the hope of foreclosing or delaying competition, and implausible that they would succeed if that strategy were attempted."[14] These findings sharply contrast with the petitioners' unsupported assertions.

In apparent recognition that they have presented no legal or factual case upon which the Commission could justify an outright eligibility restriction, DBC and WDBS mistakenly assert that MBS channels "are specifically designated for high power video operations . . . that [ILECs] are prohibited from using."[15] This purported rationale is faulty and the Commission should reject it. First, the Commission has never articulated this limitation. In fact, MBS spectrum can be used today for low power services, non-video services or any other service that complies with the Commission's technical and operational rules. The Commission also never has prevented ILECs or DSL providers from holding such spectrum. As they readily concede, DBC and WDBS simply want to prevent ILECs from developing "any competitive video services which [DBC and

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[13] *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rule Making*, 12 FCC Rcd 18600, 18620 (1997).
[14] *Id.*, *quoted* at BellSouth NPRM Comments at 19-20.
[15] *See* DBC Petition at 6; WDBS Petition at 5.

WDBS] hope[] to develop on the Mid-Band channels."[16] In other words, they want the Commission to adopt restrictions that would *prevent competition* to advance their own private interests at the expense of the public.

What petitioners fail to realize is that the Commission already has the means to monitor both non-use of spectrum and market concentration on a case-by-case basis. As to the former, the Commission "tentatively adopted" a "substantial service" performance requirement under which a licensee would lose its license if it failed to provide service.[17] This requirement will be more than sufficient to encourage commercial use of the spectrum. As to the latter, the Commission exempted from "overnight" processing any assignment, transfer and leasing arrangement application that involves spectrum "that may be used to provide interconnected mobile voice and/or data services" in areas where the licensee already holds an attributable interest.[18] The Commission expressly indicated that the BRS service would be subject to case-by-case review under this process.[19] This process will allow the Commission to better promote competition than the categorical exclusion sought by the petitioners.

II. THE COMMISSION SHOULD REJECT OTHER PROPOSALS THAT WOULD LIMIT THE FLEXIBILITY OF EBS LICENSEES TO NEGOTIATE SPECTRUM LEASES.

The Commission should reject IMWED's proposals to ostensibly restructure the ground rules for negotiating EBS spectrum leases.[20] The Commission also should reject

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[16] *Id.*
[17] *FNPRM* at ¶¶321, 328.
[18] *See, e.g.*, Section 1.9030(e)(2)(i)(A).
[19] *See* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, 19 FCC Rcd 17503 (2004) ("*Secondary Markets Second Order*") at ¶¶25-28, 57. *See also BRS/EBS Order* at ¶¶177-181.
[20] Petition for Reconsideration of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. ("IMWED Petition") at 6-11.

CTN/NIA's efforts to revive the artificial 15-year limit on the length of EBS leases and should not require EBS leases to provide EBS licensees with rights to purchase equipment upon lease termination.

A. The Minimum Educational Capacity Reservation Should Be Maintained at Five Percent.

The Commission should reject IMWED's proposal to increase the minimum educational usage requirements set forth in Section 27.1214(b)(1) from the current five percent level as unsupported by the record.[21] IMWED readily concedes that "this is not a new issue."[22] In 1998, the Commission rejected this same proposal, citing with approval BellSouth's Reply Comments in that proceeding and stating that:

> In light of the varied market strategies that different wireless cable operators will implement in a digital environment, and likewise in light of the broad range of educational uses to which ITFS licensees will seek to devote their channels, it is not a simple matter to arrive at a "one size fits all" approach towards minimum ITFS educational usage requirements and reservation of spectrum solely for instructional purposes, whether immediate or future. Therefore, because we seek to maximize the flexibility of educators and wireless cable operators to design systems which best meet their varied needs, we will adopt ITFS excess capacity leasing rules which best promote this flexibility while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation.[23]

IMWED's proposal would undermine this flexibility and would harm EBS licensees and operators. First, an operator will be reluctant to maximize its facilities if spectrum is subject to recapture. BellSouth's Reply Comments as quoted in the *Two-Way Order* proceeding made this point:

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[21] *Id.* at 8.
[22] *Id.*
[23] Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112, 19159-60 (1998) ("*Two-Way Order*") (footnote omitted).

> [a] prudent operator either refrains from making substantial use of capacity subject to recapture, or factors these risks and uncertainties into such use. Either way, capacity encumbered by recapture rights is inherently less valuable to the operator than unencumbered capacity, whether or not the ITFS licensee ever exercises its recapture rights.[24]

Second, the five percent reservation is a *minimum* amount. Quite simply, an EBS licensee is free to negotiate for additional capacity and does not need protection from the Commission. Third, IMWED offers no reason why the Commission needs to revisit its carefully-reasoned decision to afford EBS licensees additional flexibility. The Commission also should reject IMWED's request to have the Commission define how to measure the five percent minimum reservation.[25] In the *Two-Way Order*, the Commission acknowledged that defining capacity is "difficult to measure in light of the varied forms that such usage can take."[26] The Commission further explained that:

> the best course is to rely on the good faith efforts of ITFS licensees to meet the requirements set forth here. We are not instituting any new, formal, proof of compliance reporting submissions in this area. . . . In responding to audits, licensees must be ready and able to describe and document *how* they complied with these requirements.[27]

Thus, it is clear that the Commission afforded EBS licensees and their leasing partners the flexibility to measure the minimum usage requirement in any reasonable manner that meets their specific needs. Just as the Commission acknowledged that "one size does not fit all" in the amount of excess capacity set aside for educational use, it wisely made the same finding with regard to how lessors and lessees may measure reserved capacity.

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[24] *Two-Way Order* at 19158.
[25] *See* IMWED Petition at 7.
[26] *Two-Way Order* at 19162.
[27] *Id.* (emphasis added).

B. The Commission Should Not Limit the Right of EBS Licensees To Grant Lessors a Contingent Right of First Refusal To Acquire Licenses.

The Commission should reject IMWED's proposal to prevent an EBS licensee from having the right to grant its lessee a right of first refusal to acquire its license, contingent upon the Commission changing its rules to permit commercial entities to hold EBS licenses.[28] IMWED's argument ignores several important facts. First, allowing a right of first refusal clause does not obligate EBS licensees to offer them. Second, such a clause would be effective only if the Commission changed its eligibility rules to permit commercial entities to hold EBS licenses. If the Commission during a long-term lease changes its eligibility rules and the lease does not contain a right of first refusal provision, the lessee would have no way to ensure that it could retain access to the spectrum if the licensee elected to sell its license, and would have nothing to show for its substantial long-term investment in equipment, its commercial business and the educational services it sponsors. Third, as IMWED concedes, many EBS licensees have recognized the benefits from granting such a right.[29] If a lessee is willing to pay for a first refusal right as part of the overall lease, the licensee benefits from the additional consideration, and gives up only a future contingent right that might never be exercised.

C. The Commission Should Confirm that There Is No Cap on the Length of EBS Lease Terms.

In the *BRS/EBS Order*, the Commission made applicable to BRS and EBS the rules adopted in the secondary markets proceeding. Those rules do not contain any restrictions on the maximum term for secondary markets leases. Yet in providing

[28] *See* IMWED Petition at 10.
[29] *Id.*

examples of so-called "substantive use requirements" for EBS, the Commission inexplicably included a 15-year limit on lease terms.[30] CTN/NIA asks the Commission to incorporate this term limit into Section 27.1214, but provides no justification for its request.[31]

The Commission should reject CTN/NIA's request. In extending the maximum term from 10 years to 15 years in 1998, the Commission acknowledged that a longer lease term "will help to place wireless cable on a more equal footing with its competitors," noting that "15 years is the customary period for traditional cable franchises."[32] That reason no longer supports an artificial limitation on lease terms. The vast majority of BRS operators are likely to transition to providing data services that are unrelated to cable services. Moreover, the Commission also acknowledged that BRS operators would be better able to obtain investment and EBS licensees would gain greater certainty from "the assurance of long-term, stable maintenance and operational support offered by a longer lease term."[33]

More recently, the Commission adopted its secondary market leasing rules to remove barriers to spectrum usage and provide licensees with flexibility to structure their relationships to best meet their needs.[34] Consistent with these policy objectives, the Commission did not impose any term limits. There is nothing about EBS to suggest that a different rule should apply here. Indeed, the Commission's inclusion of a term limit in its discussion of "substantive use requirements" does not necessarily mean it was

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[30] *See BRS/EBS Order* at ¶181.
[31] *See* Petition for Reconsideration of the Catholic Television Network and the National ITFS Association ("CTN/NIA Petition") at 20.
[32] *Two-Way Order* at 19183.
[33] *Id.*
[34] *See* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) ("*Secondary Markets First Order*").

adopting a term limit because a limit on lease terms is not necessary to ensure educational use of EBS channels, and while certain "substantive use requirements" were included in the rules, the term limit was not.[35] The Commission thus should clarify that there is no maximum term limit for EBS leases.

D. The Commission Should Not Require EBS Leases to Provide for Equipment Purchase Rights Upon Lease Termination.

Likewise, CTN/NIA fails to demonstrate any public interest benefit in requiring EBS leases to provide licensees with the right to acquire equipment upon termination of the spectrum lease.[36] Equipment is available on the open market, and the ability to obtain the equipment has nothing to do with "substantive use" once the lease is terminated. Such a requirement would limit the flexibility of lessors and lessees to negotiate contracts and illustrates yet another attempt to have the Commission micromanage private contracts.

If the Commission disagrees, it should clearly articulate the EBS licensees' rights and obligations. To this end, BellSouth proposes that Section 27.1214(c) be revised to state that: "Upon termination of the lease, the EBS licensee shall have the right to purchase or lease such equipment, or equipment comparable thereto, as is necessary for the EBS licensee to satisfy its educational usage requirements as defined in Section 27.1214(a) or Section 27.1214(b)." The Commission also should re-affirm, as it did in

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[35] *See BRS/EBS Order* at ¶181. BellSouth supports CTN/NIA in seeking clarification of the *BRS/EBS Order* to make clear that certain "substantive use requirements" should not be construed to prohibit EBS licensees from entering into *de facto* spectrum transfer leases. *See* CTN/NIA Petition at 20-21. BellSouth also points out that Sections 1.9020(d)(2)(i) and 1.9030(d)(2)(i) permit EBS licensees to lease spectrum to commercial entities, so it is not necessary to further amend or clarify the rules as suggested by one petitioner. *See* Petition for Reconsideration of the Independent MMDS Licensee Coalition ("IMLC Petition") at 2-3.

[36] *See* CTN/NIA Petition at 20.

the *Two-Way Order*, that lessors and lessees are free to negotiate the specific terms of any such equipment purchase or lease.[37]

E. There Is No Reason for EBS Leases To Be Filed with the Commission.

The Commission should reject IMWED's renewed request to require EBS leases to be filed with the Commission in unredacted form. IMWED ignores the fact that lessors and lessees are already required to make numerous certifications certifying compliance with Commission rules and eligibility restrictions.[38] Because these certifications are made *before* the spectrum leasing activities can commence, the Commission is assured that the spectrum leasing arrangement is legal. Moreover, the licensee and the lessee must retain a copy of the lease in their files and submit copies to the Commission upon request.[39] IMWED presents no reason why these requirements are not already adequate, as the Commission has clearly found.[40]

There is no connection between compliance with EBS "substantive use requirements" and financial terms of EBS leases. Thus, IMWED's proposal is merely a transparent effort of one party to obtain the private, financial terms of contracts from other EBS licensees.[41]

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[37] *See Two-Way Order* at 19178-79.

[38] *See Secondary Markets First Order* at 20660 ("Commission review of a spectrum lease . . . might be initiated if information were to come to the attention of our staff – through the notification process or other sources (*e.g.*, news reports or press releases) – that suggested a potential problem with the lease under the applicable rules and policies").

[39] *See* Sections 1.9020(c)(6) and 1.9030(c)(5).

[40] *Secondary Markets Second Order* at ¶114 ("we continue to believe that the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties").

[41] IMWED also asks the Commission to declare invalid interference coordination agreements specifying frequency offset, except with respect to analog operations in the MBS. *See* IMWED Petition at 11. The Commission should not be interpreting private contractual provisions of interference agreements. Agreements containing offset requirements may also have a number of other provisions and requirements, some of which may be applicable to digital or two-way operations. Conversely, taking an agreement and reforming it so it applies only to the MBS channels may be contrary to the parties' intent. There is a very

III. THE COMMISSION SHOULD MODIFY ITS TRANSITION RULES.

The Commission adopted detailed rules to facilitate the transition to the band plan delineated in Section 27.5(i)(2). With one exception discussed in Part III.H. below, BellSouth generally supports the modifications suggested by a broad consensus of petitioners, and specifically urges the Commission to adopt the following measures.

A. The Commission Should Use BTAs as the Transition Area.

Nearly all petitioners questioned the Commission's decision to require transition proponents to transition all BRS and EBS licensees in its Major Economic Area ("MEA") and instead advocated BTAs as the baseline transition area.[42] Petitioners demonstrated that the expeditious nationwide transition envisioned by the Commission would not become a reality using MEAs because:

- "MEAs are so large that a single BTA licensee will likely never prove able to transition an entire MEA on its own."[43]

- transitioning entire MEAs would delay, not expedite, the transition to the new band plan.[44] This delay would be exacerbated by the likelihood that "[e]ven with the best of intentions parties will rarely prove able to coalesce on a single plan in time to meet the three-year deadline for filing initiation plans with the Commission. . . . Getting two or more likely competitors to agree on the complex minutiae of the 2.5 GHz transition process will prove expensive, time consuming, and perhaps impossible."[45]

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serious danger in the Commission unilaterally declaring invalid certain portions of arms'-length negotiated private contracts. .

[42] *See, e.g.*, Petition for Partial Reconsideration of the Wireless Communications Association International, Inc. ("WCA Petition") at 3-12; CTN/NIA Petition at 4; C&W Petition at 2-4; Petition for Reconsideration of Hispanic Information and Telecommunications Network at 2-4; IMWED Petition at 3-5; Petition for Partial Reconsideration of Nextel Communications ("Nextel Petition") at 2-8; Petition for Partial Reconsideration of Plateau Telecommunications, Inc. ("Plateau Petition") at 4-10; and Sprint Petition for Reconsideration ("Sprint Petition") at 2-4. Page references to the WCA Petition will be to the corrected version filed January 18, 2005.

[43] Nextel Petition at 4; CTN/NIA Petition at 4.

[44] *See* Sprint Petition at 3; CTN/NIA Petition at 4; SpeedNet Petition at 3.

[45] Nextel Petition at 6. *See also* C&W Petition at 3 ("it is already apparent among industry operators that such [co-proponent] partnerships are unlikely to occur between competitors").

- the cost to transition an MEA would far exceed the cost to transition a BTA, with no corresponding benefits.[46]

- transitioning by MEAs would lead to illogical results.[47]

The petitioners advance several valid reasons why BTAs are better suited for the transition area:

- BTAs more closely conform to the size and location of geographic markets where systems have developed, and licensees have developed interference and other interoperating relationships along BTA lines.[48]

- the Commission has licensed BRS channels according to BTAs,[49] which generally conform to economic centers and the range of wireless transmissions under the Commission's technical rules.

- BTAs would be consistent with Commission policies that "tailor the size of the licensed areas to balance the needs of the different prospective users of the spectrum together with other factors, including the unique characteristics of that spectrum."[50]

These compelling reasons clearly outweigh any perceived benefit that transitioning by MEAs could offer. Thus, the Commission should adopt a BTA format.[51]

B. The Initiation Period Should be Extended, Followed by a "Self-Transition"Period.

WCA and other petitioners request that the transition rules be applicable for 30 months following the effective date of rules changing the transition area to BTAs.[52] If

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[46] As Nextel put it, "[b]y including many more licensees than necessary to abate interference during a transition, the proponent's already capital- and labor-intensive obligation to transition the band is only made more so." Nextel Petition at 3-4.

[47] WCA noted that the operator in St. George, Utah would be required to transition an MEA that included Los Angeles. *See* WCA Petition at 7-9. Plateau cited its own example of having to plan the transition for two MEAs that included 25 BTAs from New Mexico to Arkansas, despite the fact that it operated in only three BTAs in New Mexico. *See* Plateau Petition at 5.

[48] *See* Sprint Petition at 3.

[49] *See, e.g.*, WCA Petition at 6.

[50] WCA Petition at 7, *quoting* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Report and Order and Further Notice of Proposed Rule Making*, 19 FCC Rcd 19078 (2004) at ¶21.

[51] BellSouth also agrees with WCA and Sprint that, in certain cases, transition proponents should have the right to transition licensees outside the BTA where the proponent believes it would be necessary to avoid interference within the BTA and to assist in meeting the post-transition interference protection standards in Section 27.1233(b)(3). *See* WCA Petition at 5-6; Sprint Petition at 4.

this change is not made, the current three-year period may not afford licensees sufficient time to initiate a transition. The Commission should implement this proposal.[53]

BellSouth has supported the "self-transition" proposal advocated by a number of commenters and petitioners.[54] BellSouth has not suggested specific deadlines or processes for self-transitioning, stating instead that a licensee must have a "fair opportunity" after the conclusion of the transition period to decide whether to exchange its spectrum or self-transition and, if it elected to self-transition, should have "sufficient time" to complete the transition and notify the Commission.[55] After further study, BellSouth believes that a licensee should have 60 days to make its election, and should have 12 months to "self-transition" and provide notice to the Commission.

C. The Commission Should Not Adopt a "Third" Band Plan.

The Commission should reject Blooston's ill-conceived proposal to create yet another band plan that would allow licensees in rural areas to receive three 6 MHz channels for high-power operations and one 5.5 MHz channel for low-power operations.[56] Blooston's proposal comes too late to be given practical consideration and creates more problems than it solves. It also fails to:

- state where in the 2495-2690 MHz band these channels would be located or whether the channels would be interleaved or de-interleaved;
- explain how high-power systems can co-exist alongside low-power systems and, in some cases, MVPDs that have "opted out;"

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[52] *See* WCA Petition at 13. If this 30-month period is adopted, there will be no need to delay the transition process, as IMLC requests. *See* IMLC Petition at 4.

[53] BellSouth disagrees with Blooston's proposal that would toll the Initiation Period if a counterproposal is filed and a dispute is pending. *See* Petition for Reconsideration and Clarification of Blooston, Mordkofsky, Dickens, Duffy & Prendergast ("Blooston Petition") at 7-8. Under the rules, the Initiation Period effectively ends when the Transition Plan is filed; the counterproposal is not filed until afterwards. In cases where a dispute arises, Section 27.1232(b)(1)(vi) tolls the 18-month period for implementing the transition.

[54] *See* BellSouth Comments at 12-13.

[55] *Id.* at 13.

[56] *See* Blooston Petition at 5. Blooston does not offer a definition for "rural area."

- demonstrate how its band plan would better serve the interests of rural licensees who can, if they elect to "opt out" and maintain operations on all of its channels without transitioning any channels, or

- answer the question of who would pay for the limited transition it advocates.

The Commission has already proposed a better solution to accommodate the interests of rural operators. Specifically, this plan would allow licensees operating on four analog channels to exchange these channels for a digital channel in the MBS providing a comparable number of programming streams, and receive financial support from the winner of the auction for the channels and area.[57] This would permit the licensee to provide the same number of video programming streams to its customers using more efficient digital technology, and would preserve the LBS and UBS for future use. This two-phased transition plan – migration to digital MBS spectrum followed by LBS and UBS licensing – will better serve the interests of rural MVPDs and transitioning markets and should be adopted in lieu of Blooston's "third option."

D. The Commission Should Amend its Transition "Opt Out" Rules.

1. The Commission Should Permit Licensees to Automatically "Opt Out" of a Transition Without Seeking Waiver.

BellSouth supports several petitioners[58] that asked the Commission to reconsider its decision permitting licensees to "opt out" of a transition only upon waiver, and instead adopt the "self-effectuating" criteria proposed by the Coalition.[59] Petitioners objected to

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[57] *See FNPRM* at ¶¶313-319.

[58] *See, e.g.*, Petition for Partial Reconsideration of the BRS Rural Advocacy Group ("Rural Group Petition") at 9-14; Petition for Reconsideration of Central Texas Communications, Inc. at 7-10; WCA Petition at 26-30.

[59] *BRS/EBS Order* at ¶76. The Coalition proposed that a BRS or EBS licensee could "opt out" of a transition if it filed a notice with the Commission within 30 days following the effective date of rules adopted in this proceeding stating that it or its affiliate: (a) is an MVPD (as defined in the Act) and it uses the 2.5 GHz band to provide service to at least five percent of the households within its GSA, or (b) is part of a system that deployed digital technology on more than seven channels as of October 7, 2002 (the date

the Commission's decision on grounds that it unnecessarily created uncertainty and delay in the transition process.[60] WCA stated that "a case-by-case review of each qualifying MVPD's waiver request would appear to be a redundant exercise whose additional paperwork, administrative costs, time delays and associated regulatory uncertainty substantially outweigh any speculative benefit [a waiver process] might have to the public."[61] Like these petitioners, BellSouth urges the Commission to adopt rules that incorporate the self-effectuating "opt-out" criteria proposed by the Coalition.

BellSouth proposes that a licensee that "opts out" should do so by filing a notice with the Commission on or before the date on which it responds to the pre-transition data request pursuant to Section 27.1231(f). Under this plan, the licensee would be obligated to respond fully to the data request in order to provide the proponent with sufficient information about its operations. With the benefit of this information, a proponent could plan around the "opting out" licensee, or seek solutions that would allow the licensee to participate in the transition consistent with its MVPD plans. The Commission should

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on which the Coalition Proposal was filed with the Commission). Stations collocated with any licensee electing to "opt out" also could elect to not join the transition. *See* "A Proposal for Revising the MDS and ITFS Regulatory Regime," filed October 7, 2002 by the Wireless Communications Association International, Inc., the National ITFS Association and the Catholic Television Network at Appendix B, p.17. *See* Supplement to Coalition Proposal filed November 14, 2002 at 4-5 (collectively, "Coalition Proposal"). The supplement was intended to "alleviate . . . concerns" of MVPDs that had recently deployed digital technology and did not yet serve five percent of the households in the GSA, and thus would not be entitled to "opt out." *Id.* at 4. The Coalition concluded that the inclusion of a second criterion would avoid the "unduly harsh" result of penalizing licensees that had recently installed more efficient digital technology in order to provide substantially more video programming channels to subscribers. *Id.*

[60] *See* Rural Group Petition at 7 ("In essence, the Commission has taken a self-effectuating proposal that would reduce burdens on Commission staff and promotes certainty that will stimulate investment, and replaced it with the vagaries and discretion of a waiver process. In the best case, transition proponents and MVPDs will lose the certainty associated with an "opt out" decision that would rest with the affected MVPD, and will lose valuable time in reconfiguring the band while the Commission considers waiver requests").

[61] WCA Petition at 29 (footnote omitted).

make clear that any BRS or EBS licensee that files a transition "opt out" notice may "self transition" its channels under any process the Commission adopts.

2. The Commission Should Ensure that Adequate Replacement Spectrum is Available to BRS-1 and BRS-2 Licensees that "Opt Out" of a Transition.

WCA observed that, upon relocation of channels BRS-1 and BRS-2 from the 2150-2162 MHz band, the new band plan does not provide for replacement spectrum for BRS-1 and BRS-2 licensees that "opt out" of a transition.[62] To resolve this problem, WCA proposed that BRS-1 would be relocated to 2496-2500 MHz and BRS-2 would be relocated to 2686-2690 MHz, neither of which overlaps existing BRS or EBS spectrum.[63] BellSouth agrees that this plan is the best solution.

E. The Commission Should Make Minor Changes to the Transition Process.

A number of the petitioners ask for specific changes to the transition process in order to better define the obligations of and facilitate better communication between the parties. BellSouth agrees that certain changes should be made.

The Commission should correct the apparent oversight in Section 27.1231(d) that omits BRS lessees from the list of eligible transition proponents.[64] Excluding BRS lessees would preclude or delay transitions, in contravention to the Commission's stated goal to expedite transitions nationwide.

The Commission should clarify in Section 27.1231(f) that the transition proponent must send pre-transition data requests to holders of BTA authorizations in the transition

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[62] *See* WCA Petition at 31-33.
[63] *Id.* at 32.
[64] *See, e.g.*, WCA Petition at 13-14; SpeedNet Petition at 4.

area, in addition to each BRS and EBS licensee in the transition area.[65] Responses to pre-transition data requests should be mandatory, should be made on or before an established deadline, and should include contact information.[66] However, BellSouth does not agree that a licensee that fails to respond should lose primary status,[67] but rather believes that the non-responding licensee should lose its rights to compensation for migrating its programming tracks and replacement downconverters.[68]

The Commission should delete from Section 27.1231(d)(3) the provision requiring engineering analyses to be included in the Initiation Plan.[69] As WCA points out, requiring interference analyses at the initial stage of the transition would be premature because so little information would be known about the facilities that would be required on each channel.[70] BellSouth also agrees that the Commission should provide public notice of the filing of Initiation Plans.[71]

The Commission also should eliminate from Section 27.1231(d)(4) the requirement that transition proponents declare when the transition will be completed because, at the time the Initiation Plan is filed, a transition proponent cannot know when the transition will be completed.[72] Following the Transition Planning Period, however, proponents will better be able to predict the date on which a market transition will be completed. Section 27.1232(b)(1)(vi) already includes a requirement that the Transition Plan provide an approximate completion date.

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[65] *See, e.g.*, COPIES/PACE Petition at 3.
[66] *See* Nextel Petition at 9-11. BellSouth does not oppose the 21-day response period Nextel proposes.
[67] *See id.* at 10.
[68] *See* Coalition Proposal at Appendix B, p.15.
[69] *See* WCA Petition at 14-15. *See also* Sprint Petition at 9.
[70] *See* WCA Petition at 15.
[71] *See, e.g.*, COPIES/PACE Petition at 4.
[72] *Se* WCA Petition at 15; Sprint Petition at 10.

BellSouth agrees that Section 27.1235(a) should be amended to eliminate the requirement that the transition proponent and "all affected licensees must jointly notify the Commission" that the Transition Plan has been implemented.[73] A statement provided by the transition proponent certifying on behalf of the affected licensees that the transition has been implemented would provide the Commission with sufficient notice without requiring a burdensome and time-consuming joint filing.

F. Transition Proponents Should be Able to Withdraw a Transition Plan Without Penalty.

As suggested by WCA[74] and others,[75] the Commission should make clear that a transition proponent that withdraws its transition plan may file a new transition plan for the same area. The transition process will be complicated, involving a number of licensees, adjacent-market interference concerns and technical considerations. In addition to this complexity, transition proponents must rely on information in the Commission's database, some of which may not reflect a licensee's technical parameters. For example, some of BellSouth's EBS lessors have filed modification applications to delete receive sites that were not in use, yet the Commission dismissed those applications, making the receive site data information in ULS over-inclusive and inaccurate. In addition, ULS is not capable of integrating certain technical information, such as whether the beam tilt is electrical or mechanical. For these reasons, licensees should have a second opportunity to file a transition plan.

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[73] *See* Nextel Petition at 16-18.
[74] *See* WCA Petition at 16-17.
[75] *See* Nextel Petition at 15; Sprint Petition at 5-6.

G. The Commission Should Adopt Transition "Safe Harbors" to Address Certain Circumstances Involving EBS Channels.

For reasons not articulated in the *BRS/EBS Order*, the Commission did not adopt three transition "safe harbors" that would be used to determine whether a transition plan was reasonable. First, in cases where an EBS licensee is contractually entitled to more than one programming track, the Coalition Proposal provides the transition proponent with alternatives to maintain this level of service without being subject to claims that the solution is not reasonable. Second, in cases where a four-channel EBS allocation is split among multiple licensees, the Coalition Proposal provides an equitable way for the transition proponent to allocate channels. Third, the Coalition Proposal proposed a "safe harbor" for transitioning EBS stations that are used for studio-to-transmitter links. BellSouth supports adoption of these additional "safe harbors" consistent with the details explained in the CTN/NIA Petition and the WCA Petition.[76]

H. Reimbursement of Transition Costs Should be Required Upon Commencement of Commercial Service.

The Commission should reject the proposal of Clearwire Corporation that would permit invoicing of *pro rata* transition-related expenses upon filing of the post-transition notice with payment due within 30 days of invoicing.[77] Reimbursement should only be required after the paying parties are using the channels for commercial purposes, as the Commission's rules intend. Further, a 30-day payment requirement imposes administrative burdens on licensees that warrant a payment date of at least 60 days.

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[76] *See* CTN/NIA Petition at 16-18; WCA Petition at 22-24. The Commission also should make clear in Section 27.1232(e)(2) that a BRS licensee may hold EBS spectrum pursuant to a channel swap under Safe Harbor #2.

[77] *See* Petition for Partial Reconsideration of Clearwire Corporation at 7.

I. The Commission Should Make Clear that BRS-1/2 Relocation Costs Will be Borne by Advanced Wireless Services Auction Winners.

BellSouth shares the concerns expressed by WCA[78] and Sprint[79] that language in the *BRS/EBS Order* could be construed to require transition proponents to bear the costs to relocate BRS-1 and BRS-2.[80] Such a reading would be inconsistent with Commission policies that require auction winners to cover the costs of relocating incumbents to new spectrum. To prevent any mischaracterization of the Commission's statement, the Commission must make clear that AWS auction winners – not BRS/EBS transition proponents – must cover the costs to relocate BRS-1 and BRS-2 to alternative spectrum.[81]

IV. THE COMMISSION SHOULD MODIFY CERTAIN TECHNICAL RULES.

BellSouth supports a number of changes to the Commission's technical rules as advocated by other petitioners.

First, the Commission should not permit Part 15 unlicensed devices to operate in the 2655-2690 MHz portion of the band.[82] As Nextel observes, "[t]he fact that massively under-deployed types of operations managed to co-exist in the [2500-2655] MHz band in the past says nothing about whether licensed and unlicensed uses can continue to coexist in the [2655-2690] MHz band in the future, particularly where, as here, both uses are expected to grow substantially."[83] In addition, allowing unlicensed devices to operate in the band limits the exclusive rights of BRS and EBS licensees to make full use of the

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[78] *See* WCA Petition at 16.
[79] *See* Sprint Petition at 7-8.
[80] *See BRS/EBS Order* at ¶88 ("The Transition Plan must include plans for relocating the EBS and BRS incumbents from spectrum that has been redesignated for MDS 1 and 2 under the rules adopted today").
[81] *See* WCA Petition at 16; Sprint Petition at 7-8.
[82] *See* Nextel Petition at 22-23.
[83] *Id.* at 23.

spectrum, inhibits their ability to permit uses in the secondary market and chills investment.

Second, the Commission should amend Section 27.55(a)(4) to require a licensee that exceeds the signal strength at its border to provide notice to the licensee in the other market.[84] With this requirement, the licensee in the other market will be better able to ensure that the neighboring licensee will reduce its signal strength once it is ready to commence service.

Third, out-of-band emissions should be measured at the outermost edges of the combined channels where a licensee is licensed on more than one adjacent-channel group.[85] For instance, a licensee that holds the E1-E3 and F1-F3 channels in a market should not be restricted to the out-of-band emission limits where channels E3 and F1 meet, but should only have to meet the limits at the outermost edges of channels E1 and F3. Any other result would lead to inefficiency and undermine the purpose of de-interleaving channels.

Fourth, the Commission should clarify the emission limits for BRS-1.[86] By applying the general out-of-band emission rules of Section 27.53(l)(2) to Mobile Satellite Service licensees operating below 2495 MHz, the Commission appears to require a BRS-1 licensee to meet the stricter spectral mask requirement 3 dB below the outer edge of the channel (*i.e.*, 2496 MHz) rather than the outer edge of the guardband (*i.e.*, 2495 MHz), preventing BRS-1 licensees from using the 2495-2496 MHz for guardband. To clarify, the Commission should state that the more stringent spectral mask must be met 3 MHz

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[84] *See id.* at 30-31.
[85] *See id.* at 31.
[86] *See* WCA Petition at 47.

from the edge of the guardband (*i.e.*, 2492 MHz) rather than 3 MHz from the edge of BRS-1 (*i.e.*, 2493 MHz).

Conclusion

BellSouth urges the Commission to amend its rules as set forth in this Consolidated Opposition and in its Comments and Reply Comments in this proceeding, and to reject the proposals of other petitioners and commenters to the extent discussed above.

Respectfully submitted,

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